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DISCHARGE OF CONTRACTS BY ALTERATION.

I.

IT was an early doctrine of the common law that alteration avoided a deed. The leading case is Pigot's Case,[1] and the doctrine is stated therein by Lord Coke, as follows:

"These points were resolved: 1. When a lawful deed is rased, whereby it becomes void, the obligor may plead *non est factum*, and give the matter in evidence, because at the time of the plea pleaded, it is not his deed.

"Secondly, it was resolved, that when any deed is altered in a point material, by the plaintiff himself, or by any stranger, without the privity of the obligee, be it by interlineation, addition, rasing, or by drawing of a pen through a line, or through the midst of any material word, that the deed thereby becomes void. . . . So if the obligee himself alters the deed by any of the said ways, although it is in words not material, yet the deed is void: but if a stranger, without his privity, alters the deed by any of the said ways in any point not material, it shall not avoid the deed.

. . . . . .

"If a deed contains divers distinct and absolute covenants, if any of the covenants are altered by addition, interlineation, or rasure, this misfeasance *ex post facto*, avoids the whole deed, as it is held in 14 H. 8, 25, 26. For although they are several covenants, yet it is but one deed, 3 H. 7, fol. 5, a. If two are bound in a bond, and afterwards the seal of one of them is broken off, this misfeasance *ex post facto* avoids the whole deed against both. *Vide* the case of Matthewson, Mich. 39 & 40 Eliz. in the Fifth Part of my Reports, fol. 23 a."

Distinction between Conveyances and Covenants.

A distinction should be observed between a deed of conveyance and a bond or covenant obliging the maker to some future performance. If a conveyance is valid when delivered, the title to the property vests in the grantee, and no subsequent alteration[2] or

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[1] 11 Coke 26 *b*.

[2] Argoll *v.* Cheney, Palmer 402; Doe *v.* Hirst, 3 Stark. 60; Agricultural Cattle Ins. Co. *v.* Fitzgerald, 16 Q. B. 432; West *v.* Steward, 14 M. & W. 47; United States *v.*

loss[1] of the deed can affect the title of the grantee, though for want of evidence he may find difficulty in enforcing his title. A bond or covenant for future performance, however, must be valid when the obligee seeks to enforce it, and the rules in Pigot's Case are applicable.[2]

This distinction between conveyances and obligations, while clear on principle, was not that which the early English law adopted. As to conveyances of corporeal hereditaments where there was a transfer of possession, it was early held that a subsequent alteration could not divest a title which had passed by the deed,[3] for it was said that the property lay in livery and the deed was but evidence of the transfer. But in the case of incorporeal hereditaments, which lie in grant, it was otherwise; the title was regarded as continuously dependent on the deed, and a subsequent alteration divested a title previously passing by the deed.[4]

West, 22 How. 315; Mallory *v.* Stodder, 6 Ala. 401; Sharpe *v.* Orme, 61 Ala. 263; Ransier *v.* Vanorsdol, 50 Ia. 130; Hollingsworth *v.* Holbrook, 80 Ia. 151; Slattery *v.* Slattery, 120 Ia. 717; Barrett *v.* Thorndike, 1 Me. 73; Goodwin *v.* Norton, 92 Me. 532; Hatch *v.* Hatch, 9 Mass. 307; Chessman *v.* Whittemore, 23 Pick. 231, 233; Alexander *v.* Hickox, 34 Mo. 496; Woods *v.* Hilderbrand, 46 Mo. 284; Donaldson *v.* Williams, 50 Mo. 407; Holladay-Klotz Co. *v.* T. J. Moss Co., 89 Mo. App. 556; Chesley *v.* Frost, 1 N. H. 145; Jackson *v.* Gould, 7 Wend. 364; Herrick *v.* Malin, 22 Wend. 388; Waring *v.* Smyth, 2 Barb. Ch. 119; Rifener *v.* Bowman, 53 Pa. 318; Booker *v.* Stivender, 13 Rich. L. 85, 90; Morgan *v.* Elam, 4 Yerg. 375; Stanley *v.* Epperson, 45 Tex. 645; North *v.* Henneberry, 44 Wis. 306.

In Argoll *v.* Cheney, Palmer 402, a little boy had torn the seals off a deed to guide the uses of a recovery, but the effect of the deed was held not destroyed.

[1] Bolton *v.* Bishop of Carlisle, 2 H. Bl., 259, 263, *per* Eyre, C. J.: "God forbid that a man should lose his estate by losing his title deeds." Donaldson *v.* Williams, 50 Mo. 407.

[2] Compare with Argoll *v.* Cheney, n. 2, p. 105, *supra*, Bayly *v.* Garford, March 125, where the seal of two obligors had been eaten by mice and rats, and this was thought to discharge a third person jointly bound with them, though his seal was uninjured. See also Michaell's Case, Owen 8; Nichols *v.* Haywood, Dyer 59 a; Seaton *v.* Henson, 2 Lev. 220, S. C. 2 Show. 28. The numerous modern decisions are cited *passim infra.*

[3] Bro. Ab. "Lease," pl. 16; Moore *v.* Waldron, 1 Rolle 188; Argoll *v.* Cheney, Palm. 402; Miller *v.* Manwaring, Cro. Car. 397, 399; Woodward *v.* Aston, 1 Vent. 296; Nelthorp *v.* Dorrington, 2 Lev. 113; Lady Hudson's Case, cited in 2 Vern. 476, and Ch. Prec. 235; Doe *v.* Hirst, 3 Stark. 60.

[4] Miller *v.* Manwaring, Cro. Car. 397, 399; Moor *v.* Salter, 3 Bulstr. 79. In Miller *v.* Manwaring the report reads: "And Jones and Berkley, Justices, . . . took a difference when an estate loseth his essence by a deed, *viz.*, where it may not have an essence without a deed, as a lease by a corporation, or of tithes, or grant of a rent-charge, or such like, if the deed be rased after delivery, it determines the estate and makes it void, but when the estate may have essence without a deed, there although it be created by a deed, and the deed is after rased by the party himself or a stranger,

By the present English law, however, a title once vested whether to corporeal or incorporeal property cannot be divested,[1] and probably the distinction of the earlier law would not now be followed in this country.[2]

The question of substantive law is complicated with a question of evidence. The original reason that a deed was discharged by alteration applied equally to the loss or accidental destruction of such an instrument. The deed was itself the obligation, not merely evidence of it, and if the deed ceased to exist in its original form the obligation necessarily ceased. But an obvious consequence of alteration, loss, or destruction was a difficulty of proving that a deed of a particular character had been made. In case of accidental loss[3] or destruction[4] courts of equity early gave relief, and later courts of law made equitable relief unnecessary by accepting secondary evidence of the deed and enforc-

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that shall not destroy the estate although it destroys the deed." The court, therefore, held rasure in a lease did not avoid the lessee's estate. Croke's opinion was, however, that the rasure destroyed the deed and also the estate of the lessee, as by a surrender.

So in Gilbert on Evidence (1st ed. p. 84, 6th ed. p. 75), "There is a difference to be taken between things that lie in livery, and things that lie in grant, for things that lie in livery may be pleaded without deed, but for a thing that lies in grant regularly a deed must be shown." See also *ibid.* 1st ed. p. 109, 6th ed. p. 95.

In Woodward *v.* Aston, 1 Vent. 296, 297 (1677), "The Court said in this case that a rent or other grant was not lost by the destruction of the deed, as a bond or *chose en action* was. (*Quaere*, if the party himself cancel it.)"

The Statute of Frauds introduced a new element into the case, since it made impossible the transfer or surrender (except by operation of law) of an estate without a writing. Consequently even voluntary cancellation of a lease granting an estate within the statute could not operate as a surrender. Magennis *v.* McCulloch, Gilb. Eq. 236; Leech *v.* Leech, 2 Ch. Rep. 100; Roe *v.* York, 6 East 86.

[1] The old distinction was criticised by Eyre, C. J., in Bolton *v.* The Bishop of Carlisle, 2 H. Bl. 259, 263: "I hold clearly that the cancelling a deed will not divest property, which has once vested by transmutation of possession, and I would go farther and say that the law is the same with respect to things which lie in grant. In pleading a grant, the allegation is that the party at such a time '*did grant*,' but if by accident the deed be lost, there are authorities enough to shew that other proof may be admitted. The question in that case is, Whether the party *did* grant? To prove this the best evidence must be produced, which is the deed: but if that be destroyed, other evidence may be received to shew that the thing was once granted."

[2] It was stated as law, however, in Lewis *v.* Payn, 8 Cow. 71.

[3] Griffin *v.* Boynton, 2 Nelson 82; Collet *v.* Jaques, 1 Eq. Cas. Ab. 32, pl. 2; Lightbone *v.* Weeden, 1 Eq. Cas. Ab. 24, pl. 7; so in the case of a lost bill of exchange. Tercese *v.* Geray, Finch 301.

[4] Brown *v.* Savage, Finch 184; Bennett *v.* Ingoldsby, Finch 262; Brookbank *v.* Brookbank, 1 Eq. Cas. Ab. 168, pl. 7; Wilcox *v.* Stuart, 1 Vern. 78; Sanson *v.* Rumsey, 2 Vern. 561, and note.

ing its provisions.[1] But alteration was regarded as due, if not to wrongdoing, at least to laches of the obligee or grantee, and equity gave him no relief.[2] If a court of law also would not receive in evidence the altered deed or secondary proof of its contents, the consequence would be to deprive any grantee or obligee of all legal rights in any case where such rights could be shown only by proof of the deed. Even if the deed vested an estate in the grantee prior to the alteration, no one would be bound to respect the title if the only legal evidence of it were destroyed. The case is analogous to that of the voluntary destruction of a conveyance by the grantee. Though this is not a reconveyance of the estate, the effect is similar if the grantee cannot prove his title nor show that the grantor's title has been divested. The rule of evidence is often broadly enough stated to lead to these results. In the last edition of Greenleaf on Evidence it is said that if a writing has been destroyed by the party wishing to prove its contents no secondary evidence will be received, unless the party can show that the destruction was not for the purpose of suppressing evidence or any fraudulent purpose.[3] No English cases, however, are cited which support so severe a rule. On the contrary, the English courts have held that not only in the case of alteration by a stranger may the altered deed be given in evidence as proof that a title passed,[4] but that this may be done even where the alteration was chargeable to the party offering the deed,[5] and similarly that the cancellation of a conveyance does not prevent proof by one consenting to the cancellation that such a convey-

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[1] See 1 Greenleaf, Ev. § 563 *b*.; Leake, Cont. (4th ed.) 580. In the case of a negotiable instrument the aid of a court of equity remained necessary, for the plaintiff in such a case could not fairly be given relief except upon the terms of giving a bond to indemnify the defendant from possible subsequent liability on the instrument if it were found. See 2 Ames Cas. B. & N. 38, 42 *n*. But this was not applied to non-negotiable instruments. Wain *v*. Bailey, 10 A. & E. 616. And in the case of negotiable instruments, reformed procedure or statutes have made resort to equity unnecessary in many jurisdictions. 2 Ames Cas. B. & N. 19 *n*.

[2] Sel. C. Chanc. *temp*. King 24. In Arrison *v*. Harmstead, 2 Barr 191 193, counsel argued that equity would reform an altered deed in favor of a purchaser, but Gibson, C. J., interrupted, "The deed is dead and equity cannot put life into it." This was cited with approval in Wallace *v*. Harmstead, 44 Pa. 492, 494. See also Marcy *v*. Dunlap, 5 Lans. 365.

[3] 1 Greenleaf, Ev. (16th ed.) § 563 *b*, citing numerous decisions.

[4] Doe *v*. Hirst, 3 Stark. 60; Hutchins *v*. Scott, 2 M. & W. 809; West *v*. Steward 14 M. & W. 47; see also Woods *v*. Hilderbrand, 46 Mo. 284; Jackson *v*. Gould, 7 Wend. 364.

[5] Agricultural Ins. Co. *v*. Fitzgerald, 16 Q. B. 432.

ance was made.[1] The Supreme Court of Alabama has followed the English decisions.[2]

In this country alteration by a stranger does not generally avoid a deed, so that such a deed can of course be given in evidence, but it has been held generally, in accordance with the rule of evidence stated above, that if a material alteration is fraudulently made the altered deed cannot thereafter be given in evidence.[3] Whether this in effect transfers the title back to the grantor depends on whether the rule is aimed solely against the party guilty of the fraudulent alteration and his heirs or donees, or whether even a *bona fide* purchaser from him would acquire no better title. It may be urged that if a purchaser is protected the fraudulent person is in effect given the benefit of his title by being allowed to sell it, though he cannot directly enforce it. Accordingly the Pennsylvania Supreme Court has held that a *bona fide* purchaser can no more assert a title than his wrongdoing grantor.[4] This conclusion is supported by the rule in regard to executory contracts avoided by alteration. Even though the contract is negotiable an innocent purchaser acquires no rights.[5]

The rights of creditors are also frequently involved. If the owner of property is so deeply indebted that he could not legally make a voluntary conveyance of it, he cannot be allowed to produce the same effect by destroying the evidence of his title by alteration or cancellation of the conveyance. His creditors may levy on the property. If, however, the debtor cancelled a deed for adequate consideration, or if he had other property sufficient

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[1] Ward *v.* Lumley, 5 H. & N. 656. See also s. c. 5 H. & N. 87; Harris *v.* Owen, West Ch. 527, s. c. *sub nom.* Harrison *v.* Owen, 1 Atk. 520.

[2] Alabama Land Co. *v.* Thompson, 104 Ala. 570; Burgess *v.* Blake, 128 Ala. 105; Harper *v.* Reaves, 132 Ala. 625. See also Woods *v.* Hilderbrand, 46 Mo. 284; Holladay-Klotz Co. *v.* T. J. Moss Co., 89 Mo. App. 556.

[3] Chesley *v.* Frost, 1 N. H. 145; Babb *v.* Clemson, 10 S. & R. 419; Withers *v.* Atkinson, 1 Watts 236; Bliss *v.* McIntyre, 18 Vt. 466; Newell *v.* Mayberry, 3 Leigh 250; Batchelder *v.* White, 80 Va. 103.

So of a written contract. Hayes *v.* Wagner, 89 Ill. App. 390.

The numerous decisions holding that a writing with an apparent alteration cannot be received in evidence unless the alteration is explained necessarily involve the same point. Decisions which allow such documents to be received in evidence on proof of the signature, leaving the question of alteration to be decided as an issue in the case, have a contrary implication. These decisions will be referred to in the January number of the REVIEW.

[4] Arrison *v.* Harmstead, 2 Barr 191, 197; Wallace *v.* Harmstad, 15 Pa. 462; Wallace *v.* Harmstad, 44 Pa. 492. See also Marr *v.* Hobson, 22 Me. 321. But see Chesley *v.* Frost, 1 N. H. 145.

[5] The decisions will be collected in the January number of the REVIEW.

to satisfy his debts, the creditors should have no greater rights than their debtor had, except so far as recording acts or other statutes may provide.[1]

The voluntary destruction or cancellation by the grantee of a conveyance is not ordinarily done for any fraudulent purpose, but it is an intentional destruction of the appropriate evidence of his title, and it would seem that a court might as well decline to allow a grantee who has done this for the very purpose of depriving himself of his rights to prove his title by secondary evidence, as to deny that privilege to one who has been guilty of some fraudulent purpose. Many cases accordingly hold that neither the grantee nor any one claiming under him can assert his title after such cancellation.[2] These decisions have not met uniform approval in this country,[3] but there are not many cases to the contrary. Cases are not in point where primary evidence of the destroyed deed was obtainable, or where the party seeking to use secondary evidence was not bound by the default or estoppel binding the original grantee. Thus the doctrine is applicable only to unrecorded deeds,[4] for when a deed has been recorded and subsequently fraudulently altered or destroyed, there is no difficulty of proof if the statute makes a copy from the records primary evidence. If, however, a deed is altered before it is recorded, the record can afford no help.[5] If a writing is not necessary to the transfer of property, as is the case with chattel property, altera-

[1] See Steeley's Creditors *v.* Steeley, 23 Ky. L. Rep. 996.

[2] Thompson *v.* Thompson, 9 Ind. 323; Patterson *v.* Yeaton, 47 Me. 308, 314; Trull *v.* Skinner, 17 Pick. 213, 215; Howe *v.* Wilder, 11 Gray 267 (but see Chessman *v.* Whittemore, 23 Pick. 231); McAllister *v.* Mitchner, 68 Miss. 672, 679; Potter *v.* Adams, 125 Mo. 118; Farrar *v.* Farrar, 4 N. H. 191; Bank *v.* Eastman, 44 N. H. 431; Sawyer *v.* Peters, 50 N. H. 143; Dukes *v.* Spangler, 35 Ohio St. 119 (see Spangler *v.* Dukes, 39 Ohio St. 642); Wiley *v.* Christ, 4 Watts 196, 199; Howard *v.* Huffman, 3 Head 562; Bliss *v.* McIntyre, 18 Vt. 466 (lease); Parker *v.* Kane, 4 Wis. 1, 22 How. 1 (but see Rogers *v.* Rogers, 53 Wis. 36; Slaughter *v.* Bernards, 97 Wis. 184, 190).

So where the name of the grantee in a deed was changed with the concurrence of the grantee first named, it was held he could not afterwards claim title in himself. Abbott *v.* Abbott, 189 Ill. 488.

[3] Cunningham *v.* Williams, 42 Ark. 170; Diver *v.* Friedheim, 43 Ark. 203; Cranmer *v.* Porter, 41 Cal. 462; Weygant *v.* Bartlett, 102 Cal. 224; Botsford *v.* Morehouse, 4 Conn. 550; Gilbert *v.* Bulkley, 5 Conn. 262; Furguson *v.* Bond, 39 W. Va. 561. See further 2 Devlin on Deeds § 300 *et seq.*; 2 Jones on Real Property § 1258.

[4] See cases cited in note 2, *supra*; Wheeler *v.* Single, 62 Wis. 380. See also Van Riswick *v.* Goodhue, 50 Md. 57.

[5] Marr *v.* Hobson, 22 Me. 321. See also Moelle *v.* Sherwood, 148 U. S. 21; Respass *v.* Jones, 102 N. C. 5. *Cf.* Chessman *v.* Whittemore, 23 Pick. 231.

tion of a bill of sale or other writing conveying such property will not prevent proof of the transfer.[1]

A deed to which there are several parties will not be avoided as to one party by the alteration of a provision which relates wholly to other parties.[2] Also a deed may operate both as a conveyance and as an obligation. Indeed most conveyances contain covenants. In such a case a material wrongful alteration will discharge the obligation, though it may not divest the title conveyed,[3] except in so far as the grantee's lack of legal evidence to prove his title by record or otherwise may in effect revest the grantor with the property. Accordingly, when a mortgage is materially and wrongfully altered by the mortgagee, any executory right which the mortgage deed gives is thereby discharged,[4] as for instance a right to enter on the mortgagor's premises and take mortgaged chattels.[5] But the mortgaged estate is still in the mortgagee, where the common law theory of the effect of a mortgage prevails.[6] Where

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[1] Ransier *v.* Vanorsdol, 50 Ia. 130; Babb *v.* Clemson, 10 S. & R. 419.

[2] Doe *v.* Bingham, 4 B. & Ald. 672; Agricultural Cattle Ins. Co. *v.* Fitzgerald, 16 Q. B. 432, 440; Robinson *v.* Phœnix Ins. Co., 25 Ia. 430; Shelton *v.* Deering, 10 B. Mon. 405; Bird *v.* Bird, 40 Me. 394; Kendall *v.* Kendall, 12 Allen 92; Herrick *v.* Baldwin, 17 Minn. 209; Holladay-Klotz Co. *v.* T. J. Moss Co., 89 Mo. App. 556; Wright *v.* Kelley, 4 Lans. 57, 63; Arrison *v.* Harmstead, 2 Barr 191, 194. But see Pigot's Case, 11 Coke 26 *b*.

In Woods *v.* Hilderbrand, 46 Mo. 284, and Burnett *v.* McCluey, 78 Mo. 676, it was held that an alteration in the description of one tract in a deed, whatever its effect on the conveyance of this tract, would not affect the validity of the deed as to another tract. But see Powell *v.* Pearlstine, 43 S. C. 403; Bowser *v.* Cole, 74 Tex. 222, where it was held that the insertion of an additional tract avoided a mortgage as to the tract originally included.

And similarly the addition in a mortgage of other notes than that which it was actually given to secure avoids the mortgage as to all the notes. Johnson *v.* Moore, 33 Kan. 90; Russell *v.* Reed, 36 Minn. 376.

In Parke Co. *v.* White River Lumber Co., 110 Cal. 658, it was held that alteration of a contract secured by a mortgage discharged the mortgage as far as the contract was concerned, but not so far as a separate note also secured by the same mortgage was concerned.

[3] Ward *v.* Lumley, 5 H. & N. 87, 656; Withers *v.* Atkinson, 1 Watts 236; Arrison *v.* Harmstead, 2 Barr 191, 194; North *v.* Henneberry, 44 Wis. 306.

[4] Harris *v.* Owen, West Ch. 527, s. c. *sub nom.* Harrison *v.* Owen, 1 Atk. 520; Cutler *v.* Rose, 35 Ia. 456; Hollingsworth *v.* Holbrook, 80 Ia. 151; Johnson *v.* Moore, 33 Kan. 90; Coles *v.* Yorks, 28 Minn. 464; Pereau *v.* Frederick, 17 Neb. 117; Kime *v.* Jesse, 52 Neb. 606; Waring *v.* Smyth, 2 Barb. Ch. 119; Marcy *v.* Dunlap, 5 Lans. 365; McIntyre *v.* Velte, 153 Pa. 350; Powell *v.* Pearlstine, 43 S. C. 403, 409.

[5] Hollingsworth *v.* Holbrook, 80 Ia. 151; Bacon *v.* Hooker, 177 Mass. 335.

[6] Harris *v.* Owen, West Ch. 527, s. c. *sub nom.* Harrison *v.* Owen, 1 Atk. 520; Kendall *v.* Kendall, 12 Allen 92 (see also Bacon *v.* Hooker, 177 Mass. 335); Cheek *v.* Nall, 112 N. C. 370; Heath *v.* Blake, 28 S. C. 406. See also Williams *v.* Van Tuyl, 2 Ohio St. 336.

a mortgage is held to give the mortgagee only a lien, however, such alteration discharges the lien.[1] Alteration of the mortgage in such a way as to invalidate it does not, however, discharge a note given with the mortgage for the mortgage debt.[2] When alteration of the note will not only avoid the note, but altogether discharge the debt, will be discussed hereafter.[3]

Kinds of Contract to which the Rule is Applicable.

The rule denying recovery where a writing has been altered might, so far as relates to the fundamental reason of the rule, have been confined to specialties, which by our law are more than mere evidence of obligations,[4] but this reason was early obscured, and the rule was largely rested on principles of evidence and policy that were equally applicable to any written contract. It is true that the rule was first extended from deeds to bills of exchange,[5] which are in truth mercantile specialties,[6] being themselves obligations, not merely evidence; and the same may perhaps be said of policies of insurance[7] to which the rule was soon extended,[8] but the grounds on which these extensions were actually made were those of lack of legal evidence and requirements of policy.

It is not surprising therefore to find in this century the rule

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[1] Johnson *v.* Moore, 33 Kan. 90; Russell *v.* Reed, 36 Minn. 376; Powell *v.* Banks, 146 Mo. 620; Kime *v.* Jesse, 52 Neb. 606; Waring *v.* Smyth, 2 Barb. Ch. 119; McIntyre *v.* Velte, 153 Pa. 350.

[2] Kime *v.* Jesse, 52 Neb. 606. See also Powell *v.* Pearlstine, 43 S. C. 403.

[3] In the January number of the REVIEW.

[4] "The alteration was a cancellation of the deed, having the same effect that tearing off the seals would have had. This rule comes down to us from a time when the contract contained in a sealed instrument was bound so indissolubly to the substance of the document that the soul perished with the body when the latter was destroyed or lost its identity for any cause." *Per* Holmes, C. J., in Bacon *v.* Hooker, 177 Mass. 335, 337.

"Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions." *Per* Holmes, J., in Blackstone *v.* Miller, 188 U. S. 189, 206.

[5] Master *v.* Miller, 4 T. R. 320, 2 H. Bl. 141.

The doctrine has been more frequently applied to bills and notes than to any other instruments. See numerous cases collected in 1 Ames Cas. B. & N. 447–449; Daniel, Neg. Inst.

[6] See 2 Ames Cas. B. & N. 872; Langdell, Summ. Cont. § 49 *et seq.*

[7] *Ibid.*

[8] Campbell *v.* Christie, 2 Stark. 64; Forshaw *v.* Chabert, 3 Brod. & B. 158.

against alteration applied not only to all written contracts,[1] but even to writings like memoranda to satisfy the Statute of Frauds,[2] which are written evidence, but cannot properly be regarded as written contracts.

Excusable Alteration.

The original reason for the rule against alteration was obviously applicable as well when the alteration was made by a stranger, or when it was made by the obligee without fraudulent intent to correct a real or supposed mistake, as when made by the obligee with fraudulent purpose; but after relief was given by equity and by the allowance of secondary evidence in cases of accidental loss or destruction, it would seem as if similar relief should have been given in case of alteration, where the obligee was innocent of any fraudulent intent, certainly where he had no part whatever in the alteration. But the English law did not take this step. Alteration by a stranger still operates as a discharge of a contract, provided the instrument was at the time in the custody of the obligee, for it is said that "a party who has the custody of an instrument made for his benefit is bound to preserve it in its original state."[3] Why he should be bound to more care to prevent alteration by a stranger than to prevent the total loss or destruction of the instrument, is difficult to see. An alteration made under a mistake of fact has been held not fatal;[4] but otherwise if the alteration was intentionally made and the mistake was only as to the legal effect of the

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[1] Powell *v.* Divett, 15 East 29; Forshaw *v.* Chabert, 3 Brod. & B. 158; United States Glass Co. *v.* West Va. Bottle Co., 81 Fed. Rep. 993; Baxter *v.* Camp, 71 Conn. 245; Johnson *v.* Brown, 51 Ga. 498; Kline *v.* Raymond, 70 Ind. 271; Andrews *v.* Burdick, 62 Iowa 714, 720; Davis *v.* Campbell, 93 Iowa 524; Lee *v.* Alexander, 9 B. Mon. 25; Phœnix Ins. Co. *v.* McKernan, 100 Ky. 97; Osgood *v.* Stevenson, 143 Mass. 399; Fletcher *v.* Minneapolis Ins. Co., 80 Minn. 152; Burton *v.* American Ins. Co., 88 Mo. App. 392; Consaul *v.* Sheldon, 35 Neb. 247; Meyer *v.* Huneke, 55 N. Y. 412; Martin *v.* Tradesmen's Ins. Co., 101 N. Y. 498; Cline *v.* Goodale, 23 Oreg. 406; American Pub. Co. *v.* Fisher, 10 Utah 147; Consumers' Ice Co. *v.* Jennings, 100 Va. 719; Schwalm *v.* McIntyre, 17 Wis. 232.

[2] Nichols *v.* Johnson, 10 Conn. 192; A. A. Cooper Wagon Co. *v.* Wooldridge, 98 Mo. App. 648; Schmidt *v.* Quinzel, 55 N. J. Eq. 792. So where several writings are essential to prove the agreement of the parties, fraudulent alteration of one invalidates all. Meyer *v.* Huneke, 55 N. Y. 412.

[3] Davidson *v.* Cooper, 13 M. & W. 343, 352.

[4] Raper *v.* Birkbeck, 15 East 17; Wilkinson *v.* Johnson, 3 B. & C. 428; Prince *v.* Oriental Bank, 3 App. Cas. 325. These were cases where the cancellation under a mistake of fact of the name of a party to an obligation was held not to discharge the party.

contract.[1] In this country the more equitable rule prevails that alteration by a stranger or spoliation, as it is often called, will not discharge the obligation.[2] The rule is the same for alteration by the obligee's agent or attorney if the obligee himself did not authorize it;[3] or by a trustee.[4] So far as negotiable instruments are concerned, however, a reversion to the English doctrine in regard to alteration by a stranger has been brought about in states which have enacted the Negotiable Instruments Law. The draftsman of that law copied the section on the subject from the English Bills of Exchange Act.[5]

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[1] Bank of Hindustan *v.* Smith, 36 L. J. (N. S.) C. P. 241. The distinction between this case and those in the preceding note seems trivial. The court may well have been influenced by the fact that there were in this case equitable grounds for holding the defendant not liable, aside from any question of alteration.

[2] United States *v.* Hatch, 1 Paine 336; Davis *v.* Carlisle, 6 Ala. 707; Nichols *v.* Johnson, 10 Conn. 192; Orlando *v.* Gooding, 34 Fla. 244; Condict *v.* Flower, 106 Ill. 105; Paterson *v.* Higgins, 58 Ill. App. 268; State *v.* Berg, 50 Ind. 496; Eckert *v.* Louis, 84 Ind. 99; Lee *v.* Alexander, 9 B. Mon. 25; Blakey *v.* Johnson, 13 Bush 197; Chessman *v.* Whittemore, 23 Pick. 231; Drum *v.* Drum, 133 Mass. 566; Church *v.* Fowle, 142 Mass. 12; Croft *v.* White, 36 Miss. 455; Medlin *v.* Platte Co., 8 Mo. 235; Moore *v.* Ivers, 83 Mo. 29; Fisherdick *v.* Hutton, 44 Neb. 122, 127; Perkins Windmill Co. *v.* Tillman, 55 Neb. 652; Schlageck *v.* Widhalm, 59 Neb. 541; Goodfellow *v.* Inslee, 1 Beas. 355; Rees *v.* Overbaugh, 6 Cow. 746; Lewis *v.* Payn, 8 Cow. 71; Dinsmore *v.* Duncan, 57 N. Y. 573; Martin *v.* Tradesmen's Ins. Co., 101 N. Y. 498; Evans *v.* Williamson, 79 N. C. 86; Whitlock *v.* Manciet, 10 Oreg. 166; Neff *v.* Horner, 63 Pa. 327; Robertson *v.* Hay, 91 Pa. 242; Pope *v.* Chafee, 14 Rich. Eq. 69; Harrison *v.* Turbeville, 2 Humph. 242; Boyd *v.* McConnell, 10 Humph. 68; Murray *v.* Peterson, 6 Wash. 418; Union Nat. Bank *v.* Roberts, 45 Wis. 373. See also cases cited in the following note. So in Ireland, Swiney *v.* Barry, 1 Jones 109. *Contra*, Den *v.* Wright, 2 Halst. 175, 177.

[3] Forbes *v.* Taylor, 35 So. Rep. 855 (Ala.); Langenberger *v.* Kroeger, 48 Cal. 147; Brooks *v.* Allen, 62 Ind. 401; Mathias *v.* Leathers, 99 Ia. 18, 21; Nickerson *v.* Swett, 135 Mass. 514; White Co. *v.* Dakin, 86 Mich. 581; Christian County Bank *v.* Goode, 44 Mo. App. 129; Hays *v.* Odom, 79 Mo. App. 425; Hunt *v.* Gray, 35 N. J. L. 227; Rees *v.* Overbaugh, 6 Cow. 746; Casoni *v.* Jerome, 58 N. Y. 321; Martin *v.* Tradesmen's Ins. Co., 101 N. Y. 498; Gleason *v.* Hamilton, 64 Hun 96, 138 N. Y. 353; Waldorf *v.* Simpson, 15 N. Y. App. Div. 297; Fullerton *v.* Sturgis, 4 Ohio St. 529; Acme Harvester Co. *v.* Butterfield, 12 S. Dak. 91; Port Huron Co. *v.* Sherman, 14 S. Dak. 461; Deering Harvester Co. *v.* White, 72 S. W. Rep. 962 (Tenn.); Bigelow *v.* Stilphen, 35 Vt. 521; Yeager *v.* Musgrave, 28 W. Va. 90; Jesup *v.* City Bank, 14 Wis. 331. But see *contra*, White Sewing Machine Co. *v.* Saxon, 121 Ala. 399; Hollingsworth *v.* Holbrook, 80 Ia. 151 (*cf.* Mathias *v.* Leathers, 99 Ia. 18); Gettysburg Nat. Bank *v.* Chisholm, 169 Pa. 564. See also Pew *v.* Laughlin, 3 Fed. Rep. 39; Bowser *v.* Cole, 74 Tex. 222. If the principal seeks to take the benefit of the agent's alteration, the effect is the same as if the principal had himself made the alteration. Nichols *v.* Rosenfeld, 181 Mass. 525; Sherwood *v.* Merritt, 83 Wis. 232.

[4] Flinn *v.* Brown, 6 Rich. L. 209. But see *contra*, as to an administrator, McMurtrey *v.* Sparks, 71 Mo. 126.

[5] Neg. Inst. Act, § 205, following Bills of Exch. Act, § 64. See 16 HARV. L. REV. 260; Hoffman *v.* Planters' Bank, 99 Va. 480. But see Jeffrey *v.* Rosenfeld, 179 Mass. 506.

An unauthorized alteration by the obligor is, of course, not allowed to affect the rights of the obligee.[1]

The propriety of relieving a party who has altered a written contract by allowing secondary evidence of the contract depends on his freedom from fraudulent or wrongful intent in making the alteration. Therefore, if the alteration was made to express more clearly the intent of the parties or to correct a real or supposed mistake, the contract is in this country generally held not avoided.[2] Similarly, a cancellation by mistake is not fatal.[3]

As to alterations authorized by the obligor, the common law made a distinction between an alteration affecting a sealed contract and one affecting other writings. As the common law required that the authority of an agent to execute a sealed instrument should be itself under seal,[4] parol authorization could not make the deed in its altered form the deed of the obligor.[5] Nor

[1] Cutts *v.* United States, 1 Gall. 69; United States *v.* Spalding, 2 Mason 478; Lane *v.* Pacific, etc., Ry. Co., 67 Pac. Rep. 656 (Idaho); Osborn *v.* Andrees, 37 Kan. 301; Hughes *v.* Littlefield, 18 Me. 400; Natchez *v.* Minor, 17 Miss. 544; Fritz *v.* Commissioners, 17 Pa. 130.

[2] Brutt *v.* Picard, Ryan & M. 37; Winnipisiogee Paper Co. *v.* New Hampshire Land Co., 59 Fed. Rep. 542; Montgomery R. Co. *v.* Hurst, 9 Ala. 513; Webb *v.* Mullins, 78 Ala. 111; Turner *v.* Billagram, 2 Cal. 520; Sill *v.* Reese, 47 Cal. 294; Sullivan *v.* California Realty Co., 75 Pac. Rep. 767 (Cal.); Hotel Lanier Co. *v.* Johnson, 103 Ga. 604; Burch *v.* Pope, 114 Ga. 334; Miller *v.* Slade, 116 Ga. 772; Shirley *v.* Swafford, 45 S. E. Rep. 722 (Ga.); Day *v.* Fort Scott Co., 53 Ill. App. 165; Osborn *v.* Hall, 160 Ind. 153; Busjahn *v.* McLean, 3 Ind. App. 281; Andrews *v.* Burdick, 62 Ia. 714; Barlow *v.* Buckingham, 68 Ia. 169; Duker *v.* Franz, 7 Bush 273; Thornton *v.* Appleton, 29 Me. 298; Croswell *v.* Labree, 81 Me. 44; Outoun *v.* Dulin, 72 Md. 536; Ames *v.* Colburn, 11 Gray 390; Produce Exchange Trust Co. *v.* Bieberbach, 176 Mass. 577; James *v.* Tilton, 183 Mass. 275; McRaven *v.* Crisler, 53 Miss. 542; Foote *v.* Hambrick, 70 Miss. 157; Cole *v.* Hills, 44 N. H. 227; Seymour *v.* Mickey, 15 Ohio St. 515; Wallace *v.* Jewell, 21 Ohio St. 163; Cline *v.* Goodale, 23 Oreg. 406; Wallace *v.* Tice, 32 Oreg. 283 (*cf.* Savage *v.* Savage, 36 Oreg. 268); Express Pub. Co. *v.* Aldine Press, 126 Pa. 347; Gunter *v.* Addy, 58 S. C. 178; McClure *v.* Little, 15 Utah 379; Wolferman *v.* Bell, 6 Wash. 84; Young *v.* Wright, 4 Wis. 144; Gordon *v.* Robertson, 48 Wis. 493. But see *contra*, Warpole *v.* Ellison, 4 Houst. 322; Kelly *v.* Trumble, 74 Ill. 428; Soaps *v.* Eichberg, 42 Ill. App. 375, 381; Hamilton *v.* Wood, 70 Ind. 306; Letcher *v.* Bates, 6 J. J. Marsh. 524; Phœnix Ins. Co. *v.* McKernan, 100 Ky. 97, 103; Evans *v.* Foreman, 60 Mo. 449; Bowers *v.* Jewell, 2 N. H. 543; Lewis *v.* Schenck, 3 C. E. Green 459; Wegner *v.* State, 28 Tex. App. 419; and see also Green *v.* Sneed, 101 Ala. 205; White Sewing Machine Co. *v.* Saxon, 121 Ala. 399; Heath *v.* Blake, 28 S. C. 406; Capital Bank *v.* Armstrong, 62 Mo. 59; Otto *v.* Halff, 89 Tex. 384.

[3] Lowremore *v.* Berry, 19 Ala. 130; Brett *v.* Marston, 45 Me. 401; Russell *v.* Longmoor, 29 Neb. 209. See also Chamberlin *v.* White, 79 Ill. 549.

[4] Mechem on Agency, § 93.

[5] Hibblewhite *v.* McMorine, 6 M. & W. 200; United States *v.* Nelson, 2 Brock. 64; Cross *v.* State Bank, 5 Ark. 525; Upton *v.* Archer, 41 Cal. 85; People *v.* Organ, 27 Ill. 27; Simms *v.* Hervey, 19 Ia. 273; Ayres *v.* Probasco, 14 Kan. 175; Burns *v.*

could the deed be valid according to its original terms for the deed in that form was destroyed by the mere fact that it possessed no longer physical identity with the original obligation.[1] It is plain, however, that if this be granted the obligee should be relieved from the consequences of such a destruction of the obligation, and in modern times wherever the instrument is unenforceable at law in its altered form, secondary evidence would be allowed to prove the original terms of the obligation, and if valid in that form it would be enforced,[2] or if the Statute of Frauds did not prevent, equity should reform the deed to conform to the agreement of parties or should treat it as if reformed.[3]

Similar reasoning is applicable if the law requires a contract of the kind which has been altered to be in writing signed by the promisor.[4]

If the writing was unsealed, an authorized alteration is binding upon both parties, and the altered form of the contract, not the original form, will be enforced.[5] In jurisdictions where the peculiar doctrines applicable to sealed contracts are no longer in force,

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Lynde, 6 Allen 305; Basford *v.* Pearson, 9 Allen 387; Lindsley *v.* Lamb, 34 Mich. 509; Williams *v.* Crutcher, 6 Miss. 71; Blacknall *v.* Parish, 6 Jones Eq. 70; Graham *v.* Holt, 3 Ired. 300; Barden *v.* Southerland, 70 N. C. 528; Martin *v.* Buffaloe, 121 N. C. 34, 36; Gilbert *v.* Anthony, 1 Yerg. 69; Mosby *v.* State, 4 Sneed 324; Walla Walla Co. *v.* Ping, 1 Wash. T. 339.

If the alteration is made before delivery by an agent of the grantor authorized to deliver, the grantor is held bound by the alteration, if not broadly on the ground that parol authority is good, then on principles of estoppel. Allen *v.* Withrow, 110 U. S. 119; Swartz *v.* Ballou, 47 Ia. 188; State *v.* Tripp, 113 Ia. 698, 704; Dolbeer *v.* Livingston, 100 Cal. 617; Phelps *v.* Sullivan, 140 Mass. 36; Field *v.* Stagg, 52 Mo. 534; Thummel *v.* Holden, 149 Mo. 677, 684; Cribben *v.* Deal, 21 Oreg. 211; Van Etta *v.* Evenson, 28 Wis. 33. *Cf.* Vaca Valley R. R. *v.* Mansfield, 84 Cal. 560. If a new delivery of the deed is made after the alteration, the deed is, of course, binding in its altered form. De Malarin *v.* United States, 1 Wall. 282; Prettyman *v.* Goodrich, 23 Ill. 330; but held otherwise if the new delivery was made without knowledge of the alterations. Nesbitt *v.* Turner, 155 Pa. 429.

[1] In McNab *v.* Young, 81 Ill. 11, it was held that the objection that an authorized insertion was made after execution could not be taken by one not claiming in the right of the grantor.

[2] Gunter *v.* Addy, 58 S. C. 178.

[3] Burnside *v.* Wayman, 49 Mo. 356; McQuie *v.* Peay, 58 Mo. 56; Bryant *v.* Bank, 107 Tenn. 560. See also Mohlis *v.* Trauffler, 91 Ia. 751.

[4] Upton *v.* Archer, 41 Cal. 85; Ingram *v.* Little, 14 Ga. 173 (overruled by Brown *v.* Colquitt, 73 Ga. 59; Smith *v.* Farmers' Mut. Ins. Assoc., 111 Ga. 737). But see Bluck *v.* Gompertz, 7 Ex. 862; Winslow *v.* Jones, 88 Ala. 496.

[5] Gardiner *v.* Harback, 21 Ill. 129; Grimsted *v.* Briggs, 4 Ia. 559; Stewart *v.* First Nat. Bank, 40 Mich. 348; Wilson *v.* Henderson, 17 Miss. 375; Humphreys *v.* Guillow, 13 N. H. 385; Taddiken *v.* Cantrell, 69 N. Y. 597; Schmelz *v.* Rix, 95 Va. 509. See also cases in the following notes.

the same result is necessarily reached as to such contracts,[1] and even in other states, for practical reasons, the same result is often reached.[2] Ratification, subsequent to the alteration, has as full effect as authority originally granted;[3] and ratification may be shown by any conduct from which assent can fairly be implied.[4]

Indeed ratification may be more effectual in the case of a sealed instrument than prior authority could have been. A sealed instrument takes its validity from delivery, and the maker may adopt a signature or seal previously made and make them his own by delivering them as his. A redelivery therefore of a sealed instrument by the obligor after it has been altered will make it binding in its altered form. A prior consent to an alteration can hardly amount to a redelivery after the alteration, but if the maker himself assists or takes part in the alteration it would generally be easy to find a new delivery, and courts which, like those of

[1] Dolbeer *v.* Livingston, 100 Cal. 617; Gardiner *v.* Harback, 21 Ill. 129; Swartz *v.* Ballou, 47 Ia. 188; State *v.* Tripp, 113 Ia. 698, 704.

[2] Speake *v.* United States, 9 Cranch 28; Drury *v.* Foster, 2 Wall. 24, 33; Woodbury *v.* Allegheny, etc., Co., 72 Fed. Rep. 371; Bridgeport Bank *v.* New York, etc., R. Co., 30 Conn. 274; Inhabitants *v.* Huntress, 53 Me. 89; State *v.* Young, 23 Minn. 551; Field *v.* Stagg, 52 Mo. 534; Otis *v.* Browning, 59 Mo. App. 326; Cribben *v.* Deal, 21 Oreg. 211; Fitzpatrick *v.* Fitzpatrick, 6 R. I. 64; Bank *v.* Hammond, 1 Rich. L. 281; Lamar *v.* Simpson, 1 Rich. Eq. 71; Schintz *v.* McManamy, 33 Wis. 301.

[3] Speake *v.* United States, 9 Cranch 28; Goodspeed *v.* Cutler, 75 Ill. 534; Scott *v.* Bibo, 48 Ill. App. 657; Emerson *v.* Opp, 9 Ind. App. 581; Pelton *v.* Prescott, 13 Ia. 567; Browning *v.* Gosnell, 91 Ia. 448; Fletcher *v.* Minneapolis Ins. Co., 80 Minn. 152; Workman *v.* Campbell, 57 Mo. 53; Humphreys *v.* Guillow, 13 N. H. 385; Conable *v.* Smith, 61 Hun 185; Wester *v.* Bailey, 118 N. C. 193; Matlock *v.* Wheeler, 29 Oreg. 64; Jacobs *v.* Gilreath, 45 S. C. 46; Ratcliff *v.* Planters' Bank, 2 Sneed 425; Chezum *v.* McBride, 21 Wash. 558. But held otherwise as to a surety. Mulkey *v.* Long, 5 Idaho 213; Warren *v.* Fant, 79 Ky. 1 (*contra*, Bell *v.* Mahin, 69 Ia. 408. See also Knoebel *v.* Kincher, 33 Ill. 308). Where the original alteration amounted to a forgery, it was held that ratification was not possible. Wilson *v.* Hayes, 40 Minn. 531 (*contra*, Marks *v.* Schram, 109 Wis. 452. See also Ofenstein *v.* Bryan, 20 App. D. C. 1).

[4] Barnsdall *v.* Boley, 119 Fed. Rep. 191; Montgomery *v.* Crossthwait, 90 Ala. 553; Dickson *v.* Bamberger, 107 Ala. 293; Payne *v.* Long, 121 Ala. 385, 131 Ala. 438; Jackson *v.* Johnson, 67 Ga. 167; Yocum *v.* Smith, 63 Ill. 321; Oswego *v.* Kellogg, 99 Ill. 590; Linington *v.* Strong, 107 Ill. 295; Canon *v.* Grisby, 116 Ill. 151; Bell *v.* Mahin, 69 Ia. 408; Dover *v.* Robinson, 64 Me. 183; Ward *v.* Allen, 2 Met. 53; Prouty *v.* Wilson, 123 Mass. 297; Stewart *v.* First Nat. Bank, 40 Mich. 348; Janney *v.* Goehringer, 52 Minn. 428; Board *v.* Gray, 61 Minn. 242; Evans *v.* Foreman, 60 Mo. 449; Reed *v.* Morton, 24 Neb. 760; Perkins Windmill Co. *v.* Tillman, 55 Neb. 652; Wright *v.* Buck, 62 N. H. 656; Conable *v.* Keeney, 61 Hun 624; Jacobs *v.* Gilreath, 45 S. C. 46. *Cf.* State *v.* Churchill, 48 Ark. 426; Benedict *v.* Miner, 58 Ill. 19; Fraker *v.* Cullum, 21 Kan. 555; Fraker *v.* Little, 24 Kan. 598; German Bank *v.* Dunn, 62 Mo. 79; Kennedy *v.* Lancaster Bank, 18 Pa. 347; McDaniel *v.* Whitsett, 96 Tenn. 10.

England, hold that there is always a delivery when the maker of a deed indicates his assent to be bound by it as a completed instrument have no difficulty in finding delivery when the maker after an alteration has been made ratifies it.[1] But if acknowledgment[2] or witnesses[3] are necessary to the validity of the deed, the assent of the parties, even though amounting to a redelivery, would be insufficient to make the alterations part of the deed.

If there are several obligors bound by an obligation, a material alteration of the obligation made with the assent of one or more parties will be binding upon those who assent,[4] but will totally avoid the obligation of any who do not assent.[5]

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[1] Hudson *v.* Revett, 4 Bing. 368; Winslow *v.* Jones, 88 Ala. 496; Stiles *v.* Probst, 69 Ill. 382; Abbott *v.* Abbott, 189 Ill. 488, 497; Bassett *v.* Bassett, 55 Me. 127; Vidvard *v.* Cushman, 35 Hun 18; Wester *v.* Bailey, 118 N. C. 193.

[2] Booker *v.* Stivender, 13 Rich. L. 85.

[3] Drury *v.* Foster, 2 Wall. 24; Bryant *v.* Bank, 107 Tenn. 560, 567. See also Keene Mach. Co. *v.* Barratt, 100 Fed. Rep. 590 (C. C. A.). But the deed may be good as between the parties. Walkley *v.* Clarke, 107 Ia. 451; Bryant *v.* Bank, 107 Tenn. 560.

[4] Hochmark *v.* Richler, 16 Col. 263; Browning *v.* Gosnell, 91 Ia. 448; Rhoades *v.* Leach, 93 Ia. 337; Brownell *v.* Winnie, 29 N. Y. 400, 409.

[5] Gardner *v.* Walsh, 5 E. & B. 83; Martin *v.* Thomas, 24 How. 315; Mundy *v.* Stevens, 61 Fed. Rep. 77; State *v.* Churchill, 48 Ark. 426; State *v.* Smith, 9 Houst. 143; Gardiner *v.* Harback, 21 Ill. 129; State *v.* Van Pelt, 1 Ind. 304; Zimmerman *v.* Judah, 13 Ind. 286, 22 Ind. 388; Horn *v.* Newton Bank, 32 Kan. 518; Warring *v.* Williams, 8 Pick. 322; Greenfield Bank *v.* Stowell, 123 Mass. 196; Board *v.* Gray, 61 Minn. 242; Love *v.* Shoape, 1 Miss. 508; Morrison *v.* Garth, 78 Mo. 434; State *v.* Findley, 101 Mo. 368; McMillan *v.* Hefferlin, 18 Mont. 385; Davis *v.* Bauer, 41 Ohio St. 257; Wills *v.* Wilson, 3 Oreg. 308; Rittenhouse *v.* Levering, 6 Watts & S. 190; Broughton *v.* Fuller, 9 Vt. 373; Bank of Ohio Valley *v.* Lockwood, 13 W. Va. 392.

See also Reese *v.* United States, 9 Wall. 13; United States *v.* Freel, 186 U. S. 309; People *v.* Kneeland, 31 Cal. 288; Cotten *v.* Williams, 1 Fla. 42; Thompson *v.* Williams, 1 Fla. 64; Ames Cas. Suretyship 246 *n.*

The court will not restore such an obligation to its original form, so as to make sureties liable again on the obligation which they assumed. Ruby *v.* Talbott, 5 N. Mex. 251; Fulmer *v.* Seitz, 68 Pa. 237. *Cf.* Davis *v.* Shafer, 50 Fed. Rep. 764; Nickerson *v.* Swett, 135 Mass. 514.

Of course, if there are entirely distinct obligations created by the same instrument, an alteration of one obligation only does not invalidate the others. But the fact that an obligation is several at law is not conclusive. Collins *v.* Prosser, 1 B. & C. 682, which held that tearing off the seal of one obligor on a several bond thereby discharging him did not destroy the obligors, is clearly erroneous. The court admit that the right of contribution in equity was affected, and this is surely material.

In Brownell *v.* Winnie, 29 N. Y. 400, the name of an obligor was added as maker to a note, and the court, in holding the alteration immaterial, relied on the fact that the obligation created was several rather than joint and several. This alone would not support the decision, but as the added signer was in fact a surety the conclusion is sound, since the original maker's liability in law and equity remained unchanged.

If an obligor signs an obligation after it has been signed by others, in ignorance of the fact that the obligation has been altered or by his signature is altered and that thereby the other obligors are discharged, the obligor signing last is also discharged if the obligee is cognizant of the facts before accepting the obligation. The signature of the last obligor does not bind him, because given under a mistake, induced by what is equivalent to misrepresentation.[1] If, however, the obligee was not notified of the alteration either constructively by the appearance of the document or actually, his legal right to enforce the obligation cannot be defeated by the unknown equity of the deceived obligor.[2]

If a contract has been avoided by alteration, the subsequent restoration of the writing to its original form without the assent of the obligor will not restore the legal obligation.[3] But if the alteration because made by mistake or without wrongful intent was not such as to avoid the obligation, and the document has been restored to its original form, it will be received in evidence and enforced.[4]

Samuel Williston.

[*To be continued.*]

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[1] Ellesmere Co. *v.* Cooper, [1896] 1 Q. B. 75; People *v.* Kneeland, 31 Cal. 288; State *v.* Craig, 58 Ia. 238; Howe *v.* Peabody, 2 Gray 556; State *v.* McGonigle, 101 Mo. 353. *Cf.* Evans *v.* Partin, 22 Ky. L. Rep. 20.

[2] Crandall *v.* Auburn Bank, 61 Ind. 349; Rhodes *v.* Leach, 93 Ia. 337; Ward *v.* Hackett, 30 Minn. 150. And see numerous cases cited in Ames Cas. Suretyship 305 *n.* to the effect that in general fraud or misrepresentation inducing the surety to enter into an obligation is no defense against a creditor innocent and ignorant of the facts. This principle was lost sight of by the court in the contrary decision of Ellesmere Co. *v.* Cooper, [1896] 1 Q. B. 75.

[3] Wood *v.* Steele, 6 Wall. 80; Warpole *v.* Ellison, 4 Houst. 322; Hayes *v.* Wagner, 89 Ill. 390, 401; Robinson *v.* Reed, 46 Ia. 219; Shepard *v.* Whetstone, 51 Ia. 457; Cotton *v.* Edwards, 2 Dana 106; Locknane *v.* Emmerson, 11 Bush 69; Citizens' Nat. Bank *v.* Richmond, 121 Mass. 110; McMurtrey *v* Sparks, 71 Mo App. 126; McDaniel *v.* Whitsett, 96 Tenn. 10; Newell *v.* Mayberry, 3 Leigh 250.

[4] Rogers *v.* Shaw, 59 Cal. 260; Kountz *v.* Kennedy, 63 Pa. 187 (see remarks on this case in Citizens' Bank *v.* Williams, 174 Pa. 66).